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No. 94-1308

In The

Supreme Court of the United States

October Term, 1994

ROBERT CHILDERS & MARY BETH CHILDERS, Individually, as Personal Representatives of the Estate of DAVID CHILDERS, and as Guardian Ad Litem for LUKE CHILDERS AND CHRISTA CHILDERS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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6 pp

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I. THE TRAIL AND OVERLOOK HAD ALREADY BEEN IDENTIFIED AS HAZARDOUS AND THE TRAIL ALREADY ONCE CLOSED – THE GOVERNMENT ARGUMENT IGNORES THESE FACTS.

The Safety Manual, Trail Manual and Sign Manual must be applied in the undisputed context that this trail was identified as being hazardous and closed for over a month. The world-renowned site was reopened to the busiest part of the season just a month before the fatal fall without any warning sign that the safety and trail manuals required.

The Government admitted in its Answer to Paragraph 9 of the Complaint that the trail had been closed because it was hazardous to visitors and posted with a "Trail Closed" sign.

The Government and the Ninth Circuit opinion both omit argument that the Trails Manual under "***Signing***" required that trails be "***adequately marked to warn visitors of safety hazards*** . . . ". Where there has been a closure of the trail with identified hazards within the Government's knowledge, there must be marking on the trail to warn the visitor. Otherwise, the visitor is simply walking into a trap without knowledge or warning.

The Government argues the case in a vacuum – it treats the trail like any other trail without taking account that it had been specifically closed due to visitor hazards. Nor does it recognize that Government knowledge of the misting, hazardous icing over the overlook and heavy recent snowfall with the burying of the fence with snow was within the special knowledge of the Government.

Consequently, the discretionary function exception has been improperly applied by the Ninth Circuit to

condone failure to mark a life-threatening hazardous situation at a well known location. If the discretionary function exception is used to block the application of the Safety Manual, then the Safety Manual has no force or effect. Thus the safety provisions and Federal Tort Claims Act are swallowed by the discretionary function exception that were enacted to place the Government in the same context as a private individual. *ARA Leisure Services v. United States,* 831 F.2d 193 (9th Cir. 1987).

The Government next argues that brochures sufficiently meet the requirements of the safety and trail manual. This totally ignores the regulations themselves which specifically state that warnings and visitor newspapers do not fulfill the duty of warning:

> "since there is a good probability that brochures may not be read." (Safety Manual, Ch. 16, P. 1.2)

The Safety Manual cites the Tenth Circuit decision that held that warnings in visitor newspapers do not fulfill the duty of warning visitors as they will not be read by many. *Smith v. United States,* 546 F.2d 872, 877 (1976) Footnote 6.

In this case, there is no dispute that the entry gate was not manned and that the Childers party did not receive any newspapers or any brochures whatsoever. (Findings 15, 18, 21, App. A)

The failure to post warning signs for a known hazardous trail is not the type of economic or policy decision that the federal discretionary function exception was intended to protect under the two-step *Berkovitz* test. *Berkovitz v. United States,* 486 U.S. 531 (1988).

II. THE NATIONAL STANDARDS SET IN THIS CASE FOR APPLICATION OF SAFETY, TRAIL AND SIGN STANDARDS PROVIDES, IN THE GOVERNMENT'S OWN WORDS, IMPORTANT NATIONAL PRECEDENT.

The Government cannot deny its own words in Appendix C of Petitioners' Brief that the Ninth Circuit decision " . . . confronts important issues relating to the discretionary function exception to the Federal Tort Claims Act and will serve as an important precedent in cases *in both the Ninth Circuit and throughout the United States.*" (Emphasis supplied) The Government argument that it is "important national precedent" but not important enough to be considered by this Court is contradictory.

The Government has not disputed the fact that this Court has not had occasion to address, in a non-regulatory setting, the application of the federal discretionary function exception in applying the *Berkovitz* and *Gaubert* standards. (See Section II of Petitioners' Brief, pages 14-16 for development of law.)

In *Rayonier, Inc. v. United States,* 352 U.S. 325 (1957) the United States was held liable for Forest Service negligence in fighting a forest fire. The Government was liable for improper maintenance of a lighthouse in *Indian Towing v. United States,* 350 U.S. 61 (1955). The Court has not further addressed maintenance or negligence cases with the development of the *Berkovitz* and *Gaubert* tests in a non-regulatory setting.

Where safety manuals confront the federal discretionary function exemption there is special need for the Court to enunciate its position.

III. NO POLICY IS IMPLICATED FOR WARNING OF A KNOWN HAZARDOUS TRAIL CONDITION.

The Government cites a whole list of circuit decisions at page 11, where the failure to post signs were not held to be discretionary. Yet, the Government continues to rely on *Kiehn v. United States*, 984 F.2d 1100 (10th Cir. 1993) that did not even apply the federal safety standards here as the standards were not even then in effect.

Again, the Government argues in only the most general sense as to whether or not at the beginning of a season they should post or not post trails in general. This ignores that during the season that the Government identified this trail as particularly hazardous as reflected by their own Exhibit 33 memo and that they actually closed the trail for over a month's time.

The Government knew of the fatal fall of seven-year-old Dennis Rumple from a railing incident just across the canyon the year prior, so they knew of the possible fatal and grave consequences to children.

Upon identifying the trail as being hazardous and closing, the Government had the obligation to follow their own safety standards which then mandated signing of the trail according to the regulation. At this point in time what kind of balancing of resources was there to make – was a $25.00 sign expense to be balanced against the known dangers of death and serious bodily injury from a 300 foot dropoff with no barrier?

The Government argues at page 7 that fencing was one option under the regulations, but the fence was entirely buried on the 300 foot drop-off section of the overlook right over where David slid in a face-down prone position.

The Ninth Circuit only considered and decided the issue of discretionary function and did not consider the merits of the other issues.[1] Petitioners here seek certiorari to the Ninth Circuit to reverse the discretionary function holding so that other meritorious appeal issues can be considered (including the failure to provide equal protection to David Childers as a passenger in a fee-paying vehicle where the District Court held that adults had paid and were not precluded from suit by Wyoming's Recreational Use Statute whereas David in the same vehicle was precluded from suit).

CONCLUSION

The Petition for Writ of Certiorari should be granted for this Court's guidance on this issue of national precedence and safety.

Respectfully submitted,

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[1] The Government makes the inaccurate argument that the District Court found "his parents were more than 50% at fault for the accident". Because the Park Service had run out of gas at Canyon, David's father had to get gas at Fishing Bridge some 13 miles to the south, and he had left without knowing that his family was even going to go down the trail. (Finding 9) There was no comparative Government negligence for the District Court to even weigh. This was because the District Court erroneously found that there was no duty under general Wyoming law, despite the only Wyoming railing-ice case which held to the contrary, and thus no Government negligence to consider at all.